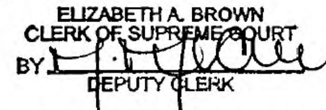
IN THE SUPREME COURT OF THE STATE OF NEVADA

RUBEN TAVAREZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 86988



SEP 12 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of second-degree murder with the use of a deadly weapon, trafficking in a controlled substance, and resisting a public officer with the use of a firearm. Eighth Judicial District Court, Clark County; Jacqueline M. Bluth, Judge.

Appellant Ruben Tavarez lived with his disabled sister, Melissa Ayala-Hernandez, and her caregiver, Paul De La Rosa. Gerald "Jerry" Romero was Melissa's son and frequently stayed at her house. On the day of the murder, Jerry paid Tavarez for drugs with a gold ring that turned out to be fake. When Tavarez found out that the ring was not real gold, he confronted Jerry at Melissa's home, then asked Jerry to go outside with him to the backyard to continue the argument. Melissa and Paul heard the argument from inside the home, Melissa heard Jerry say "Stop, Tio," then Paul and Melissa heard a noise that Paul described as a pop and Melissa described as "an echoing sound." Melissa proceeded to send Tavarez multiple texts, offering to give Tavarez money or pay his phone bill and asking him not to do anything to Jerry. When Tavarez did not respond, Paul went outside and found Jerry lying on the ground with a bullet wound to his head and Tavarez gone. Police later found Tavarez barricaded inside a house, where he shot at the robot police sent in.

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A jury convicted Tavarez of second-degree murder with use of a deadly weapon, trafficking in a controlled substance, and resisting a public officer with use of a firearm, for which the district court sentenced him to a term of 20 years to life. On appeal, Tavarez challenges the district court's denial of his motion for a mistrial, the admission of certain expert testimony, the admission of an incriminating text message, and statements made by the prosecutor during closing argument. He also argues that insufficient evidence supports the second-degree murder conviction and that cumulative error warrants reversal.

The district court did not err by denying the motion for a mistrial

The State indicted Tavarez on multiple counts, including illegal possession of a firearm by a prohibited person. Before trial, the district court granted Tavarez's motion to sever the firearm-possession charge from the other charges that he faced. *See Morales v. State*, 122 Nev. 966, 970, 143 P.3d 463, 465-66 (2006) (explaining that fairness to the defendant requires bifurcation of a felon-in-possession charge to prevent the State from discussing the prior felony convictions before the jury has decided the other, unrelated charges). Despite the severance, during voir dire, the district court twice included the firearm charge while reading the indictment to the venire. After the second time, the court told the prospective jurors that it had misread the charges and reread the charges without the firearm charge. Tavarez moved for a mistrial, arguing that this error prejudiced him by suggesting he had a prior conviction that made it illegal for him to possess a firearm. The district court denied the motion.

A decision to deny a mistrial is reviewed for a clear abuse of discretion. *Randolph v. State*, 117 Nev. 970, 981, 36 P.3d 424, 431 (2001). Severing a felon-in-possession charge prevents the jury from learning about

the defendant's "ex-felon status during the first phase of the trial." *Morales*, 122 Nev. at 970 & n.7, 143 P.3d at 466 & n.7. This is because evidence of a defendant's prior felony convictions prejudices the defendant's right to a fair trial. *Gonzalez v. State*, 131 Nev. 991, 1002, 366 P.3d 680, 687 (2015). The district court did not inform potential jury members that Tavarez had a previous felony conviction, only that he was a person prohibited from possessing a firearm. Nor did the State introduce evidence of a prior conviction. By rereading the indictment without the firearm charge, the court corrected its error without unduly calling the jury's attention to it. *See also Summers v. State*, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006) (noting that jurors are presumed to follow instructions). Thus, we conclude that it was not an abuse of discretion for the district court to deny Tavarez's motion for a mistrial.

The State provided adequate notice of its expert witness

Tavarez argues that the State did not give adequate notice under NRS 174.234 of its expert witness because the notice named a different expert. A district court's decision to allow expert testimony is reviewed under an abuse-of-discretion standard. *Perez v. State*, 129 Nev. 850, 863, 313 P.3d 862, 870 (2013). When calling an expert witness, the State must give the defendant written notice at least 21 days before trial. NRS 174.234(2) (held unconstitutional on other grounds in *Grey v. State*, 124 Nev. 110, 118, 178 P.3d 154, 160 (2008)). The State has a "continuing duty" to provide any additional information required by subsection (2) about expert witnesses to the defendant "as soon as practicable after the [State] obtains that information." NRS 174.234(3)(b). If the State "acted in bad faith by not timely disclosing" the required information, the district court

"shall prohibit the party from introducing that information in evidence or shall prohibit the expert witness from testifying." *Id.*

The record does not support Tavarez's claim that the State violated the notice requirement in NRS 174.234(3)(b) in bad faith. While the State did not give Tavarez timely notice of the expert who testified at trial, it did give him timely notice of another expert from the same department "or designee." Tavarez does not contest that the named expert and the testifying expert had the same expertise or that he was on notice that the named expert *or* a designee would testify to that information. And, although it appears from the record that the State did not disclose the testifying expert's curriculum vitae as required by NRS 174.234(2)(b), Tavarez did not object to that omission in district court. On appeal, Tavarez fails to explain how the State's failure to provide the curriculum vitae impacted his substantial rights, other than a conclusory assertion that he "was left with an inability to impeach the specific individual testifying." On this record, we conclude that the district court did not abuse its discretion by allowing the expert to testify. *See Mitchell v. State*, 124 Nev. 807, 819, 192 P.3d 721, 729 (2008) (concluding that although the State failed to make the necessary disclosures under NRS 174.234, the district court did not abuse its discretion by admitting the expert testimony because the defendant did not allege, nor did the record indicate, bad faith, and the defendant failed to show prejudice); *cf. Turner v. State*, 136 Nev. 545, 554-55, 473 P.3d 438, 447-48 (2020) (explaining that the district court abused its discretion in admitting expert testimony because the notice did not include the subject of the testimony and the expert was unqualified to testify as an expert on that subject, but affirming where the errors were harmless).

The State's failure to provide adequate notice of the cell phone maps was harmless error

Tavarez next argues that the State did not give adequate notice under NRS 174.234 of the State's expert's maps of cell phone data before introducing them at trial. Whether a district court properly admitted evidence is reviewed for an abuse of discretion. *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). Under NRS 174.234(2)(c), a party intending to present expert testimony must provide "[a] copy of all reports made by or at the direction of the expert witness" to opposing parties before trial. NRS 174.234 seeks "to place all parties on an even playing field and to prevent trial by ambush or unfair surprise." *Turner*, 136 Nev. at 553, 473 P.3d at 447 (internal quotation marks omitted).

Other state courts have upheld district court decisions to admit cell phone data maps that were not timely disclosed. For example, an Ohio appellate court found that the district court crafted an adequate remedy for late disclosure of the maps because the expert witness was disclosed before trial; both sides were introducing evidence mid-trial; and the district court allowed a voir dire of the expert about the map creation and allowed the defendant time to review the map, make any objections, and add his own data points. *State v. Gray*, 223 N.E. 3d 837, 847-48 (Ohio Ct. App. 2023) (considering a claim for ineffective assistance of counsel). Similarly, a New York appellate court found that the district court did not abuse its discretion by refusing to adjourn trial where the maps only showed written coordinates from cell phone records and the State turned over the maps to the defense on the day that the maps were created, a few days before trial, in compliance with the then-current criminal discovery statute, *People v. Shabazz*, 211 A.D.3d 1093, 1099 (N.Y. Sup. Ct. 2022). It follows that

admitting such maps at trial with adequate notice to the defense is not necessarily error.

Here, however, we conclude that the failure to timely disclose the maps was improper. The State did not turn the maps over to the defense before trial and the district court did not allow the defense time to review the maps, make objections, or voir dire the expert about their creation. At trial, the expert testified that by using a program to map raw data from call reports he could tell when and where a cell phone is connected to a tower and the coverage area of the tower. The cell phone company also generates a "Timing Advance Report" that "kind of works hand in hand with the call record report." The cell phone provider estimates the location of a phone based on how long it takes the "cell phone to talk to the [cell] tower." The State's expert used both the timing-advance information and call-report information to create images, overlaid on top of each other, to show where Tavarez's cell phone was located around the time of Jerry's killing, and referred to these maps as his "report." Given the statute's purpose to prevent trial by ambush, the portions of the exhibit the expert used for the complicated layering process he testified to at trial amount to a report that should have been disclosed to the defense under NRS 174.234(2)(c).

Ultimately though, the error was harmless. *See Perez*, 129 Nev. at 868, 313 P.3d at 874 (Douglas, J., concurring in part) (evaluating error in admitting expert testimony for harmless error). It is not clear that the State acted in bad faith or that the appropriate remedy was exclusion. *See* NRS 174.234(3)(b) (stating that the remedy is exclusion of the evidence if the party acted in bad faith). Even if the maps should have been excluded, the expert could still have testified about the location of the cell phone and there remained significant evidence to support the conviction, as discussed

below. Thus, the district court's admission of the exhibit, while erroneous, does not warrant reversal.

The district court did not abuse its discretion by admitting text messages

Shortly after Jerry was shot, Melissa sent texts to Tavarez, several of which were admitted over Tavarez's objection as "[p]resent sense impression, past recollection recorded." On appeal, Tavarez specifically targets Melissa's text to Tavarez in which she states "you killed my son," arguing that it was hearsay and that no exception applies. The State responds that the text is both a present-sense impression and an excited utterance, so its admission was proper.

We review a district court's decision to admit evidence for an abuse of discretion. *Mclellan*, 124 Nev. at 267, 182 P.3d at 109. Hearsay is an out-of-court statement that is offered to prove the truth of the matter asserted. NRS 51.035. Unless it falls under an exception, hearsay is inadmissible. NRS 51.065. Under the excited-utterance exception, "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition is not inadmissible under the hearsay rule." NRS 51.095.

Melissa testified that after hearing Tavarez and Jerry argue, she sent pleading texts to Tavarez and tried to call Tavarez repeatedly. When Tavarez did not respond, Melissa sent her caregiver, Paul, outside to check on Jerry. Paul told Melissa that Jerry was unresponsive. Soon after this, Melissa sent Tavarez the text at issue here, which said, "The hospital he's not breathing. Don't you dare show your face here. You killed my son you piece of __." Approximately three hours after the shooting, the detective who interviewed Melissa observed that she was "crying, hysterical" and "very distraught and upset the entire time" he was talking to her. This

shows that Melissa sent the text while under the stress caused by the argument and shooting. Although the district court did not admit the text under the excited utterance exception, the State argued the excited utterance exception in the district court and on appeal, and this provides a proper basis for the district court to have overruled Tavarez's hearsay objection. *See Browne v. State*, 113 Nev. 305, 312, 933 P.2d 187, 191 (1997) (noting that no reversible error occurs if the hearsay statements are admissible under an exception, even if the district court gave the wrong reason for the statements' admission). Melissa sent other texts relating to the argument and shooting at about the same time. To the extent that Tavarez argues that those other texts were likewise inadmissible, they also fall under the excited utterance exception.

Prosecutorial misconduct does not warrant reversal

Tavarez raises several instances of alleged prosecutorial misconduct. When considering whether a prosecutor's comments amount to misconduct, we consider whether the comments were improper and whether the improper comments warrant reversal. *See Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). We will not reverse a conviction if a prosecutor's improper comments are harmless error. *Id.* If the defendant fails to object at trial, we review for plain error and will only reverse if the defendant shows that the error caused "actual prejudice or a miscarriage of justice." *Id.* at 1190, 196 P.3d at 477.

Upon careful review of the record, we conclude that some prosecutorial misconduct occurred. First, in response to defense counsel's arguments, the prosecutor improperly told the jury that defense counsel did not want the jury to know about certain aspects of the involuntary manslaughter instruction "because [defense counsel] knows none of that

happened in this case." *See Butler v. State*, 120 Nev. 879, 898-99, 102 P.3d 71, 84-85 (2004) (explaining it is prosecutorial misconduct to disparage defense counsel or legitimate defense tactics). Next, the prosecutor argued a fact not in evidence by claiming that the reasonable doubt standard "is met in courtrooms across America every single day." *See Rippo v. State*, 113 Nev. 1239, 1255, 946 P.2d 1017, 1027 (1997) (concluding that the prosecutor's references to evidence not presented at trial were improper). But these were harmless. As discussed in the section that follows, sufficient evidence supports the conviction and the prosecutor's statements as to what the defense knows and about the reasonable doubt standard being met in other cases were isolated.

We need not consider whether the prosecutor's comments during closing arguments on the lack of evidence of meth use were improper. In response to Tavarez's argument he was on meth the night of the shooting and could not form the requisite intent for first degree murder, the prosecutor repeatedly stated that Tavarez had not produced evidence of intoxication. Even assuming (but not deciding) that these statements were improper, they had no impact on the verdict. This is because the jury convicted Tavarez of second-degree murder, indicating that the jury credited Tavarez's theory that he could not form the requisite intent for first-degree murder. The other instances of prosecutorial misconduct Tavarez argues either do not amount to misconduct or were not objected to and do not reach the level of plain error.

Sufficient evidence supports the second-degree murder conviction

"Murder is the unlawful killing of a human being [w]ith malice aforethought, either express or implied." NRS 200.010(1). Malice may be implied "when no considerable provocation appears, or when all the

circumstances of the killing show an abandoned and malignant heart." NRS 200.020(2). Second-degree murder "requires a finding of implied malice without premeditation and deliberation." *Desai v. State*, 133 Nev. 339, 347, 398 P.3d 889, 895 (2017). On review for sufficiency of the evidence, this court determines "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Mason v. State*, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002) (internal quotation marks omitted).

The evidence showed that that Tavarez argued with Jerry because he believed that Jerry cheated him on a drug deal. The State also presented evidence that Jerry and Tavarez went outside to continue their argument, that Melissa heard Jerry say "Stop, Tio," that both Melissa and Paul heard a loud sound, and that Melissa then heard a car leaving. Neither Melissa nor Paul was aware of anyone else being in the house or in the backyard at the time of the killing. Paul testified that he went outside and found Jerry unresponsive on the ground with a head injury. Cell phone data and expert witness testimony indicated that Tavarez was at the home around the time when Jerry was killed, after which he left. Tavarez ignored Melissa's text messages and phone calls immediately following the shooting. Finally, a State witness testified that the cause of Jerry's death was homicide. Although the defense pointed to evidence of other possible perpetrators, a rational jury could have found the essential elements of second-degree murder beyond a reasonable doubt. Thus, we conclude that sufficient evidence supports the second-degree murder conviction.

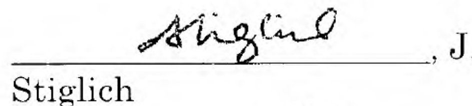
Cumulative error does not warrant reversal

Tavarez finally argues that cumulative error requires a new trial. Although errors may be harmless individually, the cumulative effect of multiple errors may violate the defendant's right to a fair trial. *Valdez*, 124 Nev. at 1195, 196 P.3d at 481. To evaluate whether multiple errors are cumulative, this court considers "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." *Id.*

The issue of guilt is not close—as discussed above, the evidence against Tavarez was compelling. But the crime charged—murder with use of a deadly weapon—was grave. *See Valdez*, 124 Nev. at 1198, 196 P.3d at 482 (concluding that first-degree murder with a deadly weapon and attempted murder with a deadly weapon are very grave). Additionally, the errors were few and of relative insignificance when viewed against the evidence as a whole. Tavarez fails to show how any error may have changed the outcome of the trial. In fact, the jury rejected the State's arguments as to first-degree murder, instead finding Tavarez guilty of second-degree murder, supporting that these errors did not prejudice Tavarez's case. For these reasons, we conclude that cumulative error does not require reversal.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.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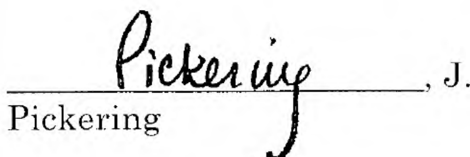
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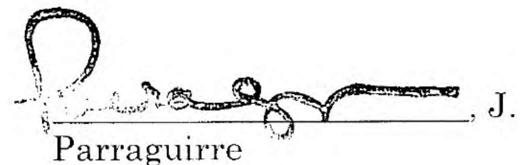
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Parraguirre

cc: Hon. Jacqueline M. Bluth, District Judge
Liberators Criminal Defense
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Clark County District Attorney
Eighth District Court Clerk